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Torts -- Malicious Prosecution -- Public Officers

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ment eliminated the requirement that the recipient of the compensation be the one who performs the services, but the court emphasized that "there is nothing in the legislative history to indicate that Congress abandoned the 'burden' theory which was the motive for enacting the original legislation."[22] In this case it is obvious that the compensation received by the taxpayer was for the services he had rendered and those services covered only a thirteen month period.

It is submitted that this "burden" test represents a desirable approach to the problem of the new partner in § 107 (a) situations. It seems that the *Marshall*[23] rationale is an unwarranted extension of the purpose behind the statute, even though the situation came under the literal language of the section, because the compensation received by the new partner was for current services although it was measured, in part, by long-term compensation. Perhaps the *Marshall* line of cases may be justified by the fact that in each of these cases the new partner was a former employee. However, under the "burden" test this should not be significant because the employee is paid for his services. Nevertheless, the Bureau of Internal Revenue has announced that it would follow these cases.[24]

The *Van Hook* decision appears to be a justifiable limitation on the scope of § 107 (a) of the Internal Revenue Code.

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Torts—Malicious Prosecution—Public Officers

It would seem that all persons capable[1] of instituting, or causing to be instituted, a malicious prosecution[2] without probable cause should

[22] 204 F. 2d at 27 (7th Cir. 1953). [23] See note 16 *supra*.

[24] In G. C. M. 26993, 1951 INT. REV. BULL. No. 22 at 2, the Bureau of Internal Revenue announced that it would follow the *Marshall* line of cases (see note 16 *supra*), and noted that in each of these cases there was a proper business motive. It stated that a partner would be entitled to allocate his share of long-term compensation over the entire period "notwithstanding the fact that part of the services" were rendered prior to the admission of the partner.

One author has suggested the possibility that the Bureau may oppose allocation where *all* of the work was done prior to the admission of the new partner, because of the wording of G. C. M. 26993, *supra*, quoted above. For this point and for a discussion of several partnership questions that have not been considered by the courts see note, 65 HARV. L. REV. 1193, 1197 (1952).

[1] It is held in some instances that a mentally incompetent person, or an infant, is not capable of instituting a malicious prosecution. 34 AM. JUR., *Malicious Prosecution* § 84 (1941).

[2] In order to establish an action for malicious prosecution, the plaintiff must prove (1) that the defendant instituted or procured the institution of the criminal prosecution against him; (2) that it was with malice; (3) that the prosecution was without probable cause; and (4) that it was terminated in favor of the plaintiff in the action. Alexander v. Lindsey, 230 N. C. 663, 55 S. E. 2d 470 (1949). No action will lie for the prosecution of a civil action with malice and without probable cause, where there has been no arrest of the person or seizure of his property. Jerome v. Shaw, 172 N. C. 862, 90 S. E. 764 (1916). Generally, see 34 AM. JUR., *Malicious Prosecution* §§ 1-171 (1941).

respond in damages for their unlawful and malicious act, and it is generally so held.[3] However, for reasons of public policy, this general principle has been limited in case of public officers.[4] If it is assumed that a plaintiff has grounds for a malicious prosecution action, the outcome of his action against a public officer,[5] who acted with malice and without probable cause,[6] will vary with the jurisdiction and the immunity given the particular officer.

The judiciary was the first group of public officers to be granted immunity for malicious acts. It is well established today that a judicial officer acting judicially and within his jurisdiction is not liable in an action for malicious prosecution, even though he may have acted maliciously and without probable cause.[7] This may seem to be a wrong without a remedy, but the rationalization for adhering to the proposi-

[3] Rieger v. Knight, 128 Md. 189, 97 Atl. 358 (1916); Mfgr.'s and Jobber's Finance Corp. v. Lane, 221 N. C. 189, 19 S. E. 2d 849 (1942); Kolka v. Jones, 6 N. D. 461, 71 N. W. 558 (1897); 34 AM. JUR., *Malicious Prosecution* § 8 (1941).

[4] Anno., 28 A. L. R. 2d 646 (1951).

[5] "A public office is an agency for the State, and the person whose duty it is to perform this agency is a public officer. This we consider to be the true definition of a public officer in its original broad sense. The essence of it is the duty of performing an agency, that is, of doing some act or series of acts for the State . . . To illustrate our definition: The Executive Department is an agency for the State, and the Governor and others, whose duty it is to discharge this agency, are public officers. The Judicial Department is an agency for the State, and the Judges are public officers. The Legislative Department is an agency of the State and the members of the Senate and House of Representatives are public officers." Clark v. Stanley, 66 N. C. 60, 63 (1871); 67 C. J. S., *Officers* § 2(b) (1950).

[6] In Ellis v. Hampton, 123 N. C. 194,195, 31 S. E. 473,474 (1898), the court had this to say about malice relative to malicious prosecution: "In Brooks v. Jones, 33 N. C., 260, it was held that in actions of malicious prosecution the plaintiff must show particular malice as *contra* distinguished from general malice, a disposition to do wrong—malice against mankind—on the part of the defendant towards him. The court said in that case: 'This particular malice may be proved by positive testimony of threats or expressions of ill will used by the defendant in reference to the plaintiff, or it may be inferred from the want of probable cause and other circumstances.' However, in Thomas v. Norris, 64 N. C., 780, apparently a different rule is laid down. There evidence of malice on the part of the defendant against another person, who was arrested under same warrant with the plaintiff, was received as evidence of malice toward the plaintiff also." Generally, see 34 AM. JUR., *Malicious Prosecution* § 135 (1941).

[7] Ravenscroft v. Casey, 139 F. 2d 776 (2d Cir. 1944), *cert. denied*, 323 U. S. 745, *rehearing denied*, 323 U. S. 814 (1944) (police judge and county judge held immune); Burgin v. Sullivan, 151 Ala. 416, 44 So. 202 (1907) (mayor acting as magistrate held immune); Prentice v. Bertken, 50 Cal. App. 2d 344, 123 P. 2d 96 (1942) (justice of peace); Curnow v. Kessler, 110 Mich. 10, 67 N. W. 982 (1896) (justice of peace); Hoppe v. Klopperich, 224 Minn. 224, 28 N. W. 2d 780 (1947) (municipal judge); Linder v. Foster, 209 Minn. 43, 295 N. W. 299 (1940) (commr. in bankruptcy proceeding); Grant v. Williams, 54 Mont. 246, 169 Pac. 286 (1917) (justice of peace); Scott v. Fishblate, 117 N. C. 265, 24 S. E. 436 (1895) (mayor acting as magistrate); Furr v. Moss, 52 N. C. 525 (1860) (justice of peace); Cunningham v. Dillard, 20 N. C. 485 (1839) (justice of peace); Shaw v. Moon, 117 Or. 558, 245 Pac. 318 (1926) (recorder judge); 34 AM. JUR., *Malicious Prosecution* § 87 (1941). *Contra:* Hagerman v. Sutherland, 16 Ky. L. R. 301, 27 S. W. 982 (1894) (justice of peace); Vennum v. Huston, 38 Neb. 293, 56 N. W. 970 (1893) (justice of peace).

tion is stated in a North Carolina case, *Scott v. Fishblate*,[8] where it is said:

> But if this is so (that there is a wrong without a remedy), it is necessarily so; and it must be taken that the plaintiff has agreed that it shall be so.
>
> But for the government of which he is a part, there would be no law, nor would there be any courts to right public wrongs, none to which the citizen (the plaintiff) could appeal to have his private rights declared and enforced. But for the law and the courts to declare and enforce the law, the plaintiff would be without remedy for any grievance, and the law of course might prevail. To have this legal protection, it is necessary to have courts, judges, justices of the peace, including mayors of towns and cities. And it is the experience and wisdom of our country that those courts cannot exist, or at least cannot discharge their judicial functions, unless they are made free from pecuniary liability for their judgments while so acting. This does not protect them from impeachment, nor from indictment for misconduct, fraud or corruption in office, because these are public wrongs committed against the government whose servants they are.

Nevertheless, some North Carolina cases contain language which might lead one to believe that the law in North Carolina is otherwise than as stated above. In *State v. Swanson*,[9] where a sheriff was being sued for malicious prosecution, the court used the following language:

> The law applicable to the facts alleged in the complaint, as enunciated by the opinions of this court, is that public officers acting in a judicial capacity or *quasi*-judicial capacity are exempt from civil liability and cannot be called upon to respond in damages to private individuals for the honest exercise of his judgment though his judgment may have been erroneous; however, in cases where a public officer, even judicial or *quasi*-judicial, instead of acting in an honest exercise of his judgment, acts corruptly or of malice, such officer is liable in a suit instituted against him by an individual who has suffered special damage by reason of such corrupt or malicious action.

But in the above quoted case, and in other North Carolina cases which contain statements that a judicial officer is not completely immune for malicious acts, it appears that the public officer involved was not

[8] 117 N. C. 265, 275, 23 S. E. 436 (1895) (contempt order of mayor acting in judicial capacity could not be questioned by plaintiff even though the mayor acted erroneously and with malice).

[9] 223 N. C. 442, 444, 27 S. E. 2d 122, 123 (1943).

a judge acting in his judicial capacity, but was an administrative or executive officer with discretionary or ministerial powers.[10] Thus, it would seem that the *Scott v. Fishblate* decision, which granted immunity to judges, justices of the peace, and mayors acting in a judicial capacity for malicious judicial acts within their jurisdiction, is not affected by *State v. Swanson,* or similar decisions.

Relative to the judiciary, the majority rule is that grand jurors may not be held liable in an action for malicious prosecution for acts performed in the discharge of their official duties, however malicious or destitute of probable cause their action may have been.[11]

As a result of the growth of administrative and executive governmental activities, many duties formerly considered to be completely ministerial in function have taken on the semblance of judicial character, and *quasi*-judicial officials[12] whose functions require the exercise of discretion in the administration of their duties have been given immunity in many jurisdictions.[13] The immunity given to administrative and executive officers exercising judgment and discretion has not been as complete as that given to judges. Prosecuting attorneys have been held immune to civil liability for their malicious actions in the performance of their duties by the majority of the jurisdictions deciding

[10] Smith v. Hefner, 235 N. C. 1, 68 S. E. 2d 783 (1951) (school trustees and park commissioners); State v. Swanson, 223 N. C. 442, 27 S. E. 2d 122 (1943) (sheriff); Wilkinson v. Burton and Ward v. Burton, 220 N. C. 13, 16 S. E. 2d 406 (1941) (division engineer of state highway); Old Fort v. Harmon, 219 N. C. 241, 13 S. E. 2d 423 (1941) (mayor and aldermen); Gurganious v. Simpson, 213 N. C. 613, 197 S. E. 163 (1938) (coroner not acting in judicial capacity); Spruill v. Davenport, 178 N. C. 364, 100 S. E. 527 (1919) (school committee); Hipp v. Ferrall, 173 N. C. 167, 91 S. E. 831 (1917) (highway commission); Templeton v. Beard, 159 N. C. 63, 74 S. E. 735 (1912) (county commissioners).

[11] Yaselli v. Goff, 12 F. 2d 396 (2d Cir. 1926), *aff'g.,* 8 F. 2d 161 (S. D. N. Y. 1925), *cert. granted,* 273 U. S. 677, and *aff'd.,* 275 U. S. 503 (1926); White v. Towers, 27 Cal. 2d 727, 235 P. 2d 209 (1951); Griffith v. Slinkard, 146 Ind. 117, 44 N. E. 1001 (1896); 38 C. J. S., *Grand Juries* § 45 (1943).

[12] The difference between judicial and *quasi*-judicial officers is explained in 34 C. J., *Judicial* § 5 (1924) as follows: "The term 'judicial' may be applied to the act of an officer who, in the exercise of his functions, is required to pass upon facts and to determine his action by the facts found; this is sometimes called a 'quasi-judicial function.' Quasi-judicial is a term used to describe acts presumed to be the product of judgment based upon evidence, either oral or visual, or both. There is a distinction between acts that are quasi-judicial and those that are purely judicial. Where a power vests in a judgment or discretion, so that it is of judicial nature, but does not involve the exercise of the functions of a judge or is conferred upon an officer having no authority of a judicial character the expression used is generally 'quasi-judicial.'"

[13] Yaselli v. Goff, 12 F. 2d 396 (2d Cir. 1926), *aff'g.,* 8 F. 2d 161 (S. D. N. Y. 1925), *cert. granted,* 273 U. S. 677, and *aff'd.,* 275 U. S. 503 (1926) (ass't. to U. S. Atty. Gen.); Pearson v. Reed, 6 Cal. App. 2d 277, 44 P. 2d 592 (1935) (city prosecutor); Griffith v. Slinkard, 146 Ind. 117, 44 N. E. 1001 (1896) (prosecuting attorney); Smith v. Parman, 101 Kan. 115, 165 Pac. 663 (1917) (city attorney); Copeland v. Donovan, 124 Misc. 553, 208 N. Y. Supp. 765 (County Ct. 1925) (prosecuting attorney); Kittler v. Kelsch, 56 N. D. 227, 216 N. W. 898 (1927) (state's attorney); Anderson v. Manley, 181 Wash. 327, 43 P. 2d 39 (1935) (prosecuting attorney); RESTATEMENT, TORTS § 656(d) (1938). *Contra:* Moye v. McLawhorn, 208 N. C. 812, 182 S. E. 493 (1935).

the question.[14] Some other administrative and executive officers who have been given immunity though they acted maliciously in the performance of their duties are as follows: postmaster general,[15] comptroller of currency,[16] secretary of treasury,[17] parole board,[18] mayor,[19] board of health,[20] superintendent of schools,[21] and town commissioners.[22] Although the tendency today seems to be toward extending immunity for malicious prosecution to public administrative and executive officers exercising judgment and discretion in the performance of their duties, North Carolina has not extended such immunity to these officials. In a tort action against county commissioners, the Supreme Court of North Carolina held in *Moye v. McLawhorn*[23] that the commissioners could not be held liable as public officers with discretionary duties *in the absence of an allegation of malice or corruption.* (Italics supplied.) The rule is stated in *Hipp v. Ferrall*[24] as follows:

> It is held in this State that public officers in the performance of their official and governmental duties, involving the exercise of judgment and discretion, may not be held liable as individuals for breach of such duty unless they act corruptly and of malice.

Law enforcement officers, *i.e.,* police,[25] constables,[26] sheriffs,[27] fish and game investigators,[28] and building inspectors,[29] have had immunity

[14] Cooper v. O'Connor, 69 App. D. C. 100, 99 F. 2d 135 (1938), *cert. denied,* 305 U. S. 643, *rehearings denied,* 305 U. S. 673 and 307 U. S. 651 (1938); 34 AM. JUR., *Malicious Prosecution* § 88 (1941); RESTATEMENT, TORTS § 656(d) (1938); see Note 13, *supra.*

[15] Spalding v. Vilas, 161 U. S. 483 (1896).

[16] Cooper v. O'Connor, 69 App. D. C. 100, 99 F. 2d 135 (1938), *cert. denied,* 305 U. S. 643, *rehearings denied,* 305 U. S. 673 and 307 U. S. 651 (1938).

[17] Standard Nut Margarine Co. v. Mellon, 63 App. D. C. 339, 72 F. 2d 557 (1934), *cert. denied,* 293 U. S. 605 (1934).

[18] Lang v. Wood, 67 App. D. C. 287, 92 F. 2d 211 (1937), *cert. denied,* 302 U. S. 686 (1937).

[19] Burgin v. Sullivan, 151 Ala. 416, 44 So. 202 (1907).

[20] Raymond v. Fish, 51 Conn. 80 (1883).

[21] Johnson v. Moser, 181 Okla. 75, 72 P. 2d 715 (1937).

[22] Brown v. Wimpenny, 239 Mass. 278, 132 N. E. 43 (1921).

[23] 208 N. C. 812, 182 S. E. 493 (1935).

[24] 173 N. C. 167, 169, 91 S. E. 831, 832 (1917).

[25] Laughlin v. Garnett, 78 App. D. C. 194, 138 F. 2d 931 (1943), *cert. denied,* 322 U. S. 738 (1943); White v. Towers, 37 Cal. 2d 727, 235 P. 2d 209 (1951); Anno., 28 A. L. R. 2d 646 (1951). *Contra:* Brown v. Wimpenny, 239 Mass. 278, 132 N. E. 43 (1921); Motley v. Dugan, 191 S. W. 2d 979 (Mo. App. 1945); Hawkins v. Reynolds, 236 N. C. 422, 72 S. E. 2d 874 (1952); Alexander v. Lindsey, 230 N. C. 662, 55 S. E. 2d 470 (1949); Perry v. Hurdle, 229 N. C. 216, 49 S. E. 2d 400 (1948); Atkinson v. Birmingham, 44 R. I. 123, 116 Atl. 205 (1922); Kidd v. Reynolds, 20 Tex. Civ. App. 355, 50 S. W. 600 (1899).

[26] White v. Towers, 37 Cal. 2d 727, 235 P. 2d 209 (1951). *Contra:* Kidd v. Reynolds, 20 Tex. Civ. App. 355, 50 S. W. 600 (1899).

[27] Coverstone v. Davies, 38 Cal. 2d 315, 239 P. 2d 876, *cert. denied,* 344 U. S. 840 (1952). *Contra:* Moser v. Fulk, 237 N. C. 302, 74 S. E. 2d 729 (1953); Alexander v. Lindsey, 230 N. C. 662, 55 S. E. 2d 470 (1949).

[28] White v. Towers, 37 Cal. 2d 727, 235 P. 2d 209 (1951).

[29] Springfield v. Carter, 175 F. 2d 914 (8th Cir. 1949); White v. Brinkman, 23 Cal. App. 2d 307, 73 P. 2d 254 (1937).

extended to them in a few jurisdictions even though they may have acted maliciously and without probable cause. Fewer jurisdictions have been willing to go this far in granting immunity than in the other two categories mentioned, *i.e.,* judiciary and administrative and executive officers. The reason for so extending immunity has been predicated on the ground that public policy requires that law enforcement officers be exempted from civil liability for acts within the scope of their authority so that they may fearlessly administer their duties.[30] That North Carolina does not extend immunity to law enforcement officers relative to an action for malicious prosecution is exemplified by the Court's statement in *Perry v. Hurdle,*[31] an action against two police officers for malicious prosecution:

> The existence of circumstances and facts strong enough to excite in a reasonable mind the well-founded belief that the person charged is guilty would be sufficient to protect a police officer who acts in good faith, though it be subsequently shown that the person arrested and prosecuted was not guilty of the offense.

In the jurisdictions which grant immunity to law enforcement officers, it is extended only if the officer acts within the scope of his authority.[32] Even where such immunity is not extended to law enforcement officers, it has been held that if the officer does no more than is required of him in the execution of a legal process, fair on its face, this constitutes a defense to any action for malicious prosecution based on such process.[33] However, the decision would be affected by the fact of whether the officer swore out the warrant in the first place. Advice of counsel before instituting an action is a defense in the majority of states,[34] but in North Carolina it is only evidence bearing on the issue of malice and probable cause.[35] North Carolina is in accord with the jurisdictions

[30] Anno., 28 A. L. R. 2d 646 (1951).

[31] 229 N. C. 216, 220, 49 S. E. 2d 400, 402 (1948).

[32] Cooper v. O'Connor, 69 App. D. C. 100, 99 F. 2d 135 (1938), *cert. denied,* 305 U. S. 643, *rehearings denied,* 305 U. S. 673 and 307 U. S. 651 (1938); Springfield v. Carter, 175 F. 2d 914 (8th Cir. 1949); Coverstone v. Davies, 38 Cal. 2d 315, 239 P. 2d 876, *cert. denied,* 344 U. S. 840 (1952).

[33] Hoppe v. Klopperich, 224 Minn. 224, 28 N. W. 2d 780 (1947); Alexander v. Lindsey, 230 N. C. 663, 55 S. E. 2d 470 (1949); Kidd v. Reynolds, 20 Tex. Civ. App. 355, 50 S. E. 600 (1899).

[34] 34 AM. JUR., *Malicious Prosecution* § 71 (1941).

[35] Bryant v. Murray, 239 N. C. 18, 79 S. E. 2d 243 (1953); Downing v. Stone, 152 N. C. 525, 530, 68 S. E. 9, 11 (1910) wherein it is said: "The decisions of this state have uniformly held that advice of counsel, however learned, on a statement of facts, however full, does not of itself and as a matter of law afford protection to one who has instituted an unsuccessful prosecution against another; but such advice is only evidence to be submitted to the jury on the issue of malice... And where it is proven that legal advice was taken by a prosecutor, this too is a relevant circumstance in connection with other facts, admitted or established, to be considered by the court in determining the question of probable cause . . . This restriction as to advice of counsel learned in the law on facts fully and fairly

which hold that a prosecution under a void warrant will not support an action for malicious prosecution in that no offense has been legally charged.[36] There is a conflict of authority on this point however.[37] If the law enforcement officer, or other public officer, escapes an action for malicious prosecution, he may still be liable for the tort of false arrest[38] or abuse of process[39] in the jurisdictions where he is not given immunity for malicious acts in the performance of his duties.

There seems to be a growing tendency to extend immunity for malicious prosecution to administrative, executive, and law enforcement officers, but it is submitted that North Carolina's position is more fair to the citizen in refusing to extend such immunity beyond judicial officers acting in a judicial capacity. It is conceded that governmental administrative, executive, and police officers should not be unduly hampered in the exercise of their duties, but it is of paramount importance that the individual citizen be granted some protection and be compensated for injury to him without right and with malice.

ELTON C. PRIDGEN

Torts—Negligence—Availability of Defense of Assumption of Risk

In an action brought by the administrator of a guest passenger in defendant's automobile to recover damages for the wrongful death of plaintiff's intestate, the North Carolina Supreme Court recently said, "Assumption of risk was not available as a defense for there was no

stated does not seem to be in accord with the weight of authority as it obtains in other jurisdictions . . . , but it has been too long accepted and acted on here to be now questioned, and we are of opinion, too, that ours is the safer position."

[36] Satilla Mfg. Co. v. Cason, 98 Ga. 14, 25 S. E. 909 (1895); Moser v. Fulk, 237 N. C. 302, 74 S. E. 2d 729 (1953); Wadkins v. Digman, 82 W. Va. 623, 96 S. E. 1016 (1918). *Contra:* Calhoun v. Bell, 136 La. 149, 66 So. 761 (1914); Williams v. Vanmeter, 8 Mo. 339 (1844).

[37] 34 AM. JUR., *Malicious Prosecution* § 21 (1941).

[38] "The second question of law involves the distinction between actions for false arrest or imprisonment and malicious prosecution. Corpus Juris, Vol. 25, p. 444, draws the distinction as follows: 'Put briefly, the essential difference between a wrongful detention for which malicious prosecution will lie, and one for which false imprisonment will lie, is that in the former the detention is malicious but under due forms of law, whereas in the latter the detention is without color of legal authority.' The Court adopted the same view of the law in Rhodes v. Collins, 198 N. C. 23, 150 S. E. 492. *Clarkson,* J., said: 'False imprisonment is based upon the deprivation of one's liberty without legal process, while malicious prosecution is for a prosecution founded upon legal process, but maintained maliciously and without probable cause.'" Young v. Hardwood Co., 200 N. C. 310, 311, 156 S. E. 501, 502 (1931).

[39] "The tort of abuse of process is sometimes confused with malicious prosecution. In both, an injury is caused by the wrongful employment of legal process, but the two are definitely distinguishable. In malicious prosecution the gist of the injury is commencing an action or causing process to issue as an incident thereto, without justification. Malice, want of probable cause, and a termination of the proceeding adverse to the party who commenced it must be shown. On the other hand, an action for abuse of process lies not because the defendant has set process in motion but because he has misapplied or perverted it for a wrongful end after it has been issued." Note, 16 N. C. L. REV. 277, 278 (1938).